

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

Steve Sviggum, Commissioner,  
Department of Labor and Industry,

**SECOND PREHEARING ORDER**

v.

M.A. Mortenson Company,

This matter came before Administrative Law Judge Eric L. Lipman for oral argument on Respondent's Motion to Compel during the earlier-scheduled Pre-Hearing Conference of December 18, 2008.

Jackson Evans, Assistant Attorney General, appeared on behalf of Commissioner Sviggum and the Minnesota Department of Labor and Industry (the Department). Phyllis Karasov and Tricia L. Matzek, Moore, Costello & Hart, P.L.L.P., appeared on behalf of M.A. Mortenson Company.

Based upon the submissions of the parties, the oral argument of counsel and the contents of the file in this matter, Respondent's Motion to Compel the production of documents is GRANTED-IN-PART.

**IT IS HEREBY ORDERED:**

1. Within 30 days of the date of this Order the Department shall disclose to counsel for the Respondent, M.A. Mortenson Company, the following documents:
  - a. A listing of the names, and if maintained by the agency, the address, of the 443 employers that have been cited for a violation for 29 C.F.R. § 1910.134 (a)(2) by the Department since January 1, 2003, and as to which the investigation is now closed.
  - b. A listing of the names, and if maintained by the agency, the address, of the employers that have been cited for a violation for 29 C.F.R. § 1910.134 (a)(2) by the Department since January 1, 2003, as to which both the investigation file is open and a proceeding before the Office of Administrative has been initiated.

- c. Copies of the Citations issued to the 74 employers that have been cited for a violation for 29 C.F.R. § 1910.134 (a)(2) by the Department since October 1, 2007, and as to which the investigation is now closed.
- d. Copies of the Notifications of Penalties issued to the 74 employers that have been cited for a violation for 29 C.F.R. § 1910.134 (a)(2) by the Department since October 1, 2007, and as to which the investigation is now closed.
- e. Copies of the Citations issued to the employers that have been cited for a violation for 29 C.F.R. § § 1910.134 (a)(2) by the Department as to which both the investigation file is open and a proceeding before the Office of Administrative has been initiated.
- f. Copies of the Notifications of Penalties issued to the employers that have been cited for a violation for 29 C.F.R. § 1910.134 (a)(2) by the Department as to which both the investigation file is open and a proceeding before the Office of Administrative has been initiated.
- g. Copies of the Citations issued to the 8 employers that have been cited for a violation for 29 C.F.R. § 1926.52 (d)(1) by the Department since January 1, 2003, provided that the investigation file is closed or a proceeding before the Office of Administrative has been initiated.
- h. Copies of the Notifications of Penalties issued to the 8 employers that have been cited for a violation for 29 C.F.R. § § 1926.52 (d)(1) by the Department since January 1, 2003, provided that the investigation file is closed or a proceeding before the Office of Administrative has been initiated.

Dated: December 31, 2008

/s/ Eric L. Lipman

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ERIC L. LIPMAN  
Administrative Law Judge

## MEMORANDUM

Complainant, Steve Sviggum, Commissioner of the Minnesota Department of Labor and Industry, on behalf of the Department's Occupational Safety and Health program ("MNOSHA") brought an action against M. A. Mortenson Company ("Mortenson") seeking an order confirming two Citations and Notifications of Penalty issued to Mortenson pursuant to the Minnesota Occupational Safety and Health Act.

On December 11, 2007, MNOSHA issued the two citations to Mortenson. The first Citation was issued for an alleged violation of 29 C.F.R. § 1910.134(a)(2), which obliges certain employers to establish and maintain a respiratory protection program. The second Citation was issued for an alleged violation of 29 C.F.R. § 926.52(d)(1), which obliges certain employers to administer an effective hearing conservation program.

Those citations were contested by Mortenson through a timely Notice of Contest.

On March 20, 2008, the Complainant issued the Summons and Complaint seeking an Order that affirmed the portions of the Citations and Notifications of Penalty contested by Mortenson.

Mortenson asserts that the claimed violations follow from an arbitrary, capricious and unlawful application of the relevant worker safety regulations. In support of its defense, Mortenson seeks to explore, through discovery, examples of the Department's enforcement claims against other contractors under the same regulations.

On July 24, 2008, Mortenson served Requests for Admissions, Interrogatories, and Requests for Production of Documents on Complainant. Among the discovery requests were the following inquiries:

INTERROGATORY NO. 7: Identify any other person or employer to whom you have issued a citation for violation of 29 C.F.R. § 1910.134(a)(2) since January 1, 2003.

INTERROGATORY NO. 8: Identify any other person or employer to whom you have issued a citation for violation of 29 C.F.R. § 1926.52(d)(1) since January 1, 2003.

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REQUEST NO. 12: All Citations and Notification of Penalties identified in response to Interrogatories 7 and 8 above.<sup>1</sup>

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<sup>1</sup> See, Affidavit of Tricia L. Matzek, Ex. A.

The Department objects to the requests as overbroad, unduly burdensome and unlikely to lead to the discovery of relevant information. As to the nature of the burdens imposed in retrieving documents that are responsive to the requests, the Department asserts that:

- (a) 505 citations have been issued for violation of the respiratory protection program requirements of 29 C.F.R. § 1910.134(a) between January 1, 2003 and November 30, 2008.
- (b) 443 of the 505 files referenced above are closed inspection files. 62 of the 505 files referenced above files are open inspection files.
- (c) Documents for 74 of the 443 closed inspection files – relating to regulatory actions after October 1, 2007 – are contained within the Department’s electronic imaging system.
- (d) Documents for 369 of the 443 closed inspection files are filed amongst the MNOSHA’s other paper records in various places in the Department’s Lafayette Road headquarters.
- (e) 8 citations have been issued for violation of the respiratory protection program requirements of 29 C.F.R. § 1910.52(d)(1) between January 1, 2003 and November 30, 2008.<sup>2</sup>

Additionally, at oral argument on Mortenson’s Motion to Compel, the Department asserted that because Citations and Notifications of Penalties in such matters include “civil investigative data” under the Minnesota Government Data Practices Act, the Department’s policy is never to disclose copies of these materials.

#### **A. Legal Standards**

In the ordinary course of litigation on worker safety citations that are contested, the parties are entitled to reasonable discovery.<sup>3</sup>

Pursuant to Minn. R. 1400.6700, subpart 2, the party seeking an order compelling discovery “shall have the burden of showing that the discovery is needed for the proper presentation of the party’s case, is not for purposes of delay, and that the issues or amounts in controversy are significant enough to warrant the discovery.”

With one exception (that is not applicable in this case) “data collected by a government entity as part of an active investigation undertaken for the purpose of the commencement or defense of a pending civil legal action, or which are retained in

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<sup>2</sup> See, Affidavit of Carrie L. Darmody, at ¶¶ 2, 3, 5 and 6.

<sup>3</sup> See, Gary W. Bastian, *Comm’r, Dep’t of Labor and Indus. v. Mid-America Dairymen, Inc.*, OAH Docket No. 12-1901-10694-2 (1996) (<http://www.oah.state.mn.us/aljBase/19010694.or.htm>).

anticipation of a pending civil legal action, are classified as protected nonpublic data pursuant to section 13.02, subdivision 13, in the case of data not on individuals ....<sup>4</sup>

The more general rule relating to the official actions of state agencies, outside of the specific exemptions set forth in the Minnesota Government Data Practices Act, is that state agencies are required to “make and preserve all records necessary to a full and accurate knowledge of their official activities.” Access to these records of official activities “shall be permitted to inspect and copy public government data at reasonable times and places ....”<sup>5</sup>

## **B. Analysis**

In undertaking the balancing of interests contemplated by Minn. R. 1400.6700, subpart 2, the Administrative Law Judge concludes that disclosure of some of the more recent materials encompassed by Mortenson’s requests are likely to lead to the discovery of relevant evidence. Some detail regarding the recent practice and interpretations of the Department when enforcing the regulations cited in this case, could be relevant to Mortenson’s defense that the stance taken by the Department in the disputed citations is arbitrary and unlawful.<sup>6</sup>

Moreover, in the view of the Administrative Law Judge, the Department’s blanket claim that copies of Citations and Notifications of Penalties in worker safety matters – regardless of whether they are in “open inspection files,” “closed inspection files,” in cases yet-to-be presented, or in cases that have been presented to the Office of Administrative Hearings – all comprise protected civil investigative data, is too broad.

The proper line of demarcation as to official documents of this type is whether the Citation or Notification of Penalty is part of an active file that may be the subject of an administrative proceeding, or instead is part of a file as to which such a proceeding has been commenced, ended or abandoned. As the Attorney General has opined, Orders of this sort from the Department are different in character than say – the confidential memoranda of agency investigators.

[T]he “data” contained in [Commissioner’s Orders to Comply and Penalty Assessment under the Worker’s Compensation statutes] or objections was not “collected” or “retained” by the agency “as part of an active

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<sup>4</sup> See, Minn. Stat. § 13.39 (2)(a) (2008).

<sup>5</sup> See, Minn. Stat. §§ 13.03 (3) and 15.17 (1) (2008).

<sup>6</sup> Compare generally, *In the Matter of the Proposed Suspension, Revocation, or Non-Renewal of the Nursing Home Licenses of Parkway Manor Healthcare Center and Innsbruck Healthcare Center*, OAH Docket No. 1-0900-2820-2 (1989) (as to “information concerning disciplinary action and performance evaluation of investigators involved in the assessments made against the Respondents’ facilities,” and the investigators’ ability to “review and interpret data or apply nursing home regulations,” the Administrative Law Judge held that “[a]lthough such data about an investigator which was generated 10 years ago will have presumably less relevance, it could potentially still have some bearing on an investigation occurring in 1987”) (<http://www.oah.state.mn.us/aljBase/09002820.89.htm>).

investigation undertaken for the purpose of the commencement or defense" of a proceeding.

While they were undoubtedly *based upon* information gathered during an investigation, the order and the amended order are not part of the investigation process. The Orders were part of the civil legal action itself, in which the Commissioner had ordered that certain persons and companies which violated Minnesota law had to comply with the law and be assessed penalties for their violations. The Orders were the official documents initiating the process that could lead to an administrative proceeding. In that respect the Orders are analogous to criminal citations, arrest warrants, or a civil summons, which are at all times public in the hands of the originating agency....<sup>7</sup>

In this assessment, the Minnesota Supreme Court apparently concurs — in part. In *Westrom v. Minnesota Dep't of Labor and Industry*, 686 N.W.2d 27 (Minn. 2004), all of the parties agreed, and the Court did not instruct otherwise, that Commissioner's Orders to Comply and Penalty Assessment under the Worker's Compensation statutes become public as soon as they are the subject of a petition for a hearing with the Office of Administrative Hearings.<sup>8</sup> It is this dividing line that is carried forward here, in this Order.

Lastly, producing copies of items that are electronically stored, part of open case files, or part of a discreet set of identifiable items (as in the case of the 8 citations that have been issued for violation of the respiratory protection program requirements), would not be unduly taxing upon Department personnel. Production of items from approximately 80 to 100 files that are within ready reach of agency staff, strikes the right balance between the Respondent's right to inquire, the burdens of production to the agency and the utility of the underlying materials in this case.

As modified above, disclosure of the requested Citations and Notifications of Penalty data is reasonable in scope and likely to lead to the discovery of admissible evidence.

**E. L. L.**

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<sup>7</sup> See, Op. Atty. Gen. 523a-27 (Aug. 4, 2000) (<http://www.ag.state.mn.us/Resources/opinions/080400.htm>) (emphasis in original).

<sup>8</sup> See, *Westrom*, 686 N.W.2d at 36.